Office Supreme Court U. S.
FILED
MAR 3 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

OREGON AND CALIFORNIA RAILROAD COMPANY, appellant,
v.
THE UNITED STATES, APPELLEES. } No. 186.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEES.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

OREGON AND CALIFORNIA RAILROAD COMPANY, appellant,
v.
THE UNITED STATES, APPELLEES. } No. 186.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEES.

The opinion of the trial court and the cases cited by the court of appeals do away with the necessity for an extended brief. The Northern Pacific, Southern Pacific and other grants show that, in the view of Congress, occupancy by homestead settlers constitutes in the case of unsurveyed lands, a "claim or right" and a "disposal" of the lands. See *Nelson* v. *Northern Pacific.*

Our grant is similar, being one affecting the unsurveyed, almost unexplored northwest. It grants public lands and expressly denies that it grants lands "granted, sold, reserved, *occupied by homestead settlers*, preempted or *otherwise* disposed of." Indemnity lands were to be

obtained from "public lands, not mineral." It would seem to be a reasonable construction of this particular grant that "lands occupied by homestead settlers" were not to be taken as indemnity lands.

The lands in question were such lands when the appellant sought to get them as indemnity lands. Congress did not intend, however, to protect homestead settlers in the *place* limits and allow the company to dispossess them in the *indemnity* limits.

Much stress is laid by counsel upon the alleged fact, which they pretend to prove by testimony from their own land books, that at the time of the granting act and definite location of the road they lost in the primary limits of the grant so many tracts of land that at the definite location of the road they became entitled to all of the lands at that time free for selection within the indemnity limits. The theory is that no selection was necessary in this case, because, being entitled to the whole, there was no occasion for selecting among the tracts available.

We contend that the alleged fact is not proven, and also that the necessity for selection, as in other cases, would remain, even if it were.

The fact is not proven, for appellant has mistaken the law in attempting to make the proof. They evidently relied upon the Dunmeyer case. Their witnesses undertook to show the loss in the primary limits, and also the fact that lands were not free within indemnity limits by merely showing homestead and preemption filings or donation notifications *of record*

and *uncanceled* at the date of the grant or at the date of the filing of the map of definite location. (See Record, p. 82.)

Up to the time of the Dunmeyer decision (113 U. S., 629), railroad companies were allowed to take, as falling into the grant, all tracts as to which there were homestead and preemption claims which were abandoned after the definite location of the road. That case held that this was wrong, and that it was enough that the claims were of record at the time of definite location, since that determined what the company took and what the company did not take in the primary limits. Since then, however, the court has made it clear that the intention of the Dunmeyer case was that the company should lose in the primary limits only those tracts as to which, at the date of the definite location, there were claims under the homestead, preemption, and other laws, which were existing claims and not mere records. Thus it was held in *Northern Pacific Ry.* v. *DeLacey* (174 U. S., 622) that the railroad company took the land claimed by the individual claiming under the preemption law, because there had been a cancellation of the individual claim, not as a matter of fact, but by operation of the law which allowed the preemptor so many months in which to make proof and payment.

It necessarily follows that the pretended proof that so many tracts were lost at the date of definite location, amounting to no more than testimony intended to show that there were filings on record, amounts to nothing

at all. The same remark applies to similar proof that in the indemnity limits only so many tracts were at that time open to selection.

But even if the proof were satisfactory, the logical conclusion that no selection was necessary because the company was entitled to all the lands in the indemnity limits not taken up at the time of definite location is unsound, when we consider that the lands within the indemnity limits remained open to homestead and preemption without regard to whether a sufficient amount would be left for the company or not. (*Southern Pacific* v. *Bell*, 183 U. S., 689.)

The logical mistake made in this matter is the assumption that a grant of a definite quantity is made. What is granted is the unoccupied place lands at the time of definite location, whether many or few, and in addition the right to select and obtain unoccupied indemnity lands, whether many or few at the time of selection.

The opinion of the lower court in this case gives another reason why the proposed theory should be regarded as erroneous.

It is a theory particularly inapplicable in this case, it seems to us, because the lands in the place and indemnity limits, even at this late day, do not seem to be all surveyed lands. They certainly were not, to any great extent, surveyed when the road was definitely located. If it now turns out, therefore, that there was a deficiency of lands at the time of the definite location, or if it shall so turn out when the surveying is completed and the selecting and approving of

lists is completed, the fact was certainly unknown and unknowable when the settlements here in question were made upon these lands, and it would be singularly unjust to deprive these individual claimants of rights by working back any such theory as that proposed to the time of their settling in good faith and living and building and working upon these unsurveyed lands in the indemnity limits.

The brief of the appellant contains quotations and citations which we are very glad to have submitted to the discrimination of this court.

The monstrous doctrine that there is one law between individuals and another law between individuals and railroad companies is original with counsel. His quotations and citations in no way support it.

It is pleasant to know that equality prevails between railroads, as per the quotation from *St. Paul Railroad* v. *Winona*, without regard to the lengths of the roads or relative capitals invested.

The first part of the brief is taken up with quotations concerning surveyed lands, that is, lands as to which records could and were required to be made within thirty days in preemption cases and immediately in homestead cases, and to a misuse of the case of *Tarpey* v. *Madsden*, which is the one upon which we principally rely; for it holds that *settlement* before definite location, where no declaratory statement could be filed, would take land out of the place grant if stated *after* definite location in the declaratory statement as occurring prior to such definite location.

That decision and *Nelson* v. *Northern Pacific*, holding, in the case of unsurveyed *place* lands, that *settlement* in 1881 prior to definite location in 1884, there being a survey and application to file in *1893*, long after definite location, gave the settler the land, seem to leave little to be said in this case. Substitute selection, even as understood by appellant, for definite location, which he concedes we should do, and what is left of his argument?

One overworked quotation is from the case of *St. Paul and Pacific* v. *North. Pac.* (139 U. S., 1), relied upon by the other side as showing that where there is a deficiency of indemnity lands to make up losses, no selection is necessary. There the court was considering whether the failure to select, under those circumstances, was a ground in itself for refusing to decide for the plaintiff as to indemnity lands, among others, where there was nothing else to interfere with its rights. The lands were and remained withdrawn from sale by express statutory provision and no individual rights were involved in the controversy. The other company having no rights whatever in the indemnity area, as held by the court, it did not lie in its mouth to raise the question whether the lands had been selected or not. The decision of the case turned on other questions between the two railroad companies, and what is quoted on this point of there having been no selection should be confined to the case then decided and similar cases. The court did not intend to say, and there was no occasion for it to consider, whether

as against the claims of those, not parties to that suit and therefore not affected by the decision, based upon settlements or other acts in an indemnity area, the mere deficiency of lieu lands at the time of definite location gives the company a title to all the lieu lands at that time unsettled.

So as to the case of *Tarpey* v. *Madsden* (178 U. S., 215). There the question was whether, the railroad having been located in 1868 and an individual, after the land office existed, made a declaratory statement to the effect that he had settled in 1869, a third person could long afterwards show by parol that this was not so and that the settlement was really prior to 1868. The court held that he could not, but said: "If Olney was in possession of this tract before October 20, 1868, with a view of entering it as a homestead or preemption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such a way as to protect his rights." In other words, his rights dated from settlement, and so antedated the definite location, but as he made a different record when the land office was opened, a stranger could not be heard long after to say that Olney's settlement was other than he had said it was. The record, going back to the settlement as he declared it, was held controlling, under those circumstances, on the principle that Congress desired something like certainty in railroad grants, and therefore that the record,

rather than matter in pais, should be consulted to ascertain them. The same seems to be the desire of Congress as to homestead and preemption and other claims; hence the requirement of declaratory statements and filings in homestead and preemption claims. But all this is consistent with the various inceptions of titles—of railroads to place lands at the moment of filing a map of location; of the railroads to indemnity lands at the moment of selection, under the direction of the Secretary—that is, of his approval; of individual homesteaders and preemptors at the moment of settlement.

Here there was not a lack of a local land office, but an equivalent thing—the office was not open to settlers on unsurveyed land.

The theory of the brief of appellant is ingenious, but attaches too much importance to the maxim, which is chiefly useful where other principles are inapplicable, that he who is first in time is stronger in right.

Counsel seek to show a right in the individual claimants and a right on the part of the land company—to show that these two were equal or balanced—and then to deduce that, because the company filed its selection list before the homesteader filed his claim, after the plat of survey was ready, the company took the title to the particular tracts. Their idea seems to be that the right of selection was a float so long as the plat of survey was not filed, and that the right of the individual homesteader or preemptor was a float, or something of the kind, and that they were in the position

of two companies having rights of selection within the same belt, so that the first to put a claim of record should prevail.

We do not understand, however, that the matter is quite so simple and the equality quite so clear.

What the company had in this case was not a title, inchoate or other, to the particular tracts in question. It had less rights to the particular tracts in question than a qualified preemptor who had not settled upon them. It had a right upon the ascertainment of certain deficiencies in the primary limits, which the Secretary of the Interior would ascertain with due deliberation and consideration of the condition of the lands there, to go into a large belt of country and suggest to the Secretary that it was entitled to so many tracts of lieu lands, whereupon the Secretary would inquire what lands in that belt could or should, all things considered, be given to the company, and especially whether any particular tracts that might be suggested by the company could be so given.

The language in our grant, "shall be selected by said companies under the *direction* of the Secretary of the Interior," is, we submit, no more or less than the language in other grants "it shall be the duty of the Secretary of the Interior to cause to be selected." See the grant made on the day following the date of ours, July 26, 1866, to the Union Pacific Southern Branch. In other words, the effective thing is not what the company suggests, but what the Secretary does. The duty of selecting is his duty. His action and nothing

else fixes the beginning of the company's title to a particular tract of indemnity land. To choose what another "directs" to be chosen is for that other to do the choosing, or it is nonsense. The granting laws say nothing about any lists to be submitted to the Secretary. They are submitted for convenience and without any recognition from the law. The Secretary could select without them if he preferred. They give the company no right whatever, by relation or otherwise, and the tracts to be selected are not even identified by them. (*Wisconsin Central Railroad Co.* v. *Price Co.*, 133 U. S., 496.)

The individual preemptor, however, did not start out with a vague thing like this. If lands were not occupied, he had a right, without regard to the Secretary, to go and settle upon a particular tract, inhabit it, build upon it, and acquire it for his home by complying with certain fixed requisites; so as to the homesteader. These people in our case were not only able to, but had done all these things in the way of settlement, dwelling, and building.

It would be tedious to go over the different laws of Congress which recognize the substantial rights of such persons from the time they take (R. S., 2268) "the initiatory steps required by law in regard to actual settlement;" and it would be quite tedious to go over the various decisions of this court recognizing such substantial rights and inchoate or inceptive *titles* to the *particular tracts* settled upon.

In this case, as conceded in the brief of counsel, the

legal title would not pass to the company until selection and approval thereof. Such selection and approval are likened by counsel to a definite location of place lands, such as were under discussion in the case of *Nelson* v *Northern Pacific Ry. Co.*, in which the difference between the rights of a settler upon surveyed and unsurveyed lands are discussed. The court there says:

> Nor is there any conflict between the decision now rendered and *Northern Pacific Railroad* v. *Colburn* (164 U. S., 383); for, as appears from the opinion and record in that case, the land there claimed to have been occupied by a homestead settler, at the date of definite location, was *surveyed* public land, and the good faith of the occupation was not manifested by an entry, or an attempt at entry, at any time in the local land office. It was held that the inchoate right of the homesteader must be initiated by a filing in the land office. In the present case, as we have seen, the land occupied was unsurveyed, and at the time of such occupancy, the land being unsurveyed, there could not then have been any filing or entry in the land office.
>
> The case before us is altogether different. Nelson's occupancy occurred after the passage of the act of 1880. * * * The act of 1880, in its application to public lands which had not become already vested in some company or person, must be held to have *so modified the order of withdrawal, based merely on general route, that such order would not affect any occupancy or settlement made in good faith, as in the case of Nelson, after the passage of that act and prior to definite location.*

This referred to place lands, where the definite location gives the fee to the company. Counsel in our case treat selection as the equivalent of definite location. Here *settlement* on unsurveyed land preceded selection, even if we regard the filing of lists by the company as selection.

If the theory of counsel that no rights are acquired by homesteaders and preemptors on unsurveyed lands, which they were authorized by express statutes (as in the case of lands in Oregon) to acquire under the homestead and preemption laws, is to be upheld, then the laws referred to were a fraud upon the citizens of the country.

Citizens were invited to settle, to cultivate, to inhabit, to build, and to improve unsurveyed lands, and were told that after the plat of survey should be filed they would have six months (or, as it was afterwards made, three months, instead of the ordinary thirty days) in which to file their claims.

The natural and reasonable meaning of this was, not that they were persons without right, squatting upon the lands, but that they were to have rights of a substantial character, and that they were to be exclusive rights, to be lost only by their own negligence in not filing claims within six or three months after it became practicable to file them—that is to say, to describe the lands as they were required to do, which could only be done after the public surveys had been platted and filed.

They did not understand that they were so without

right as against others that they must file their claims on the very day of the filing of the survey plat or lose their homes, with all the labor, time, and money.

Such of them as were within the railroad indemnity limits, where they were authorized to be, naturally and properly understood that the three months constituted a period within which the rights of the railroad company were excluded, and after the expiration of which the rights of the railroad company should attach, notwithstanding their claims, so that they would be thereafter certain on the records.

If Congress did not mean this, it set a trap for these people, to make them hewers of wood and drawers of water for the benefit of the railroad companies employing attorneys in Washington to telegraph them on what day the plats would be filed in the local offices, so that they might procure advance copies of the place-land surveys, list lands among those, and list proposed indemnity lands, and by a sudden move acquire the homes of the settlers.

Congress had no such intention. We find from the report of the Committee on Public Lands of March 17, 1880, that this matter of telegraphing from Washington did not escape the attention of Congress in passing the act of 1880. In speaking of relinquishments and cancellations the report says:

> Under the present system, in very many instances, a party after buying the improvements and paying several hundred dollars therefor, is unable to enter the land by reason of the fact

> that some other party desiring to enter same procures the assistance of an attorney in Washington City, who telegraphs him information when cancellation is made.
>
> * * * * *
>
> Under the present system a party who desires to contest and procure the cancellation of an entry is compelled to pay all expenses for same, made by himself or the claimant, and after doing so is often defeated in securing the land by reason of not being the first legal applicant. This bill proposes to secure to such contestant a reasonable time in which to make such entry.

It can not be that Congress had any other thought in allowing homesteaders three months in the act of 1880, than that they should have three months to find out that the plat had been filed, to find out on what particular surveyed tract they lived, to draw up papers which would properly describe the tract, and to make the filings, which would by no means be the initiatory steps of their proceedings, but rather the completion of them, and this without being cut off by intervening claimants. That act expressly says that the claimant's right shall relate back to the date of settlement, the same as if he settled under the preemption laws.

For what purpose could it be said that this right should relate back to the time of settlement, except to prevent his losing the land by a scheme of some intervening claimant of one kind or another?

The act of 1880 was itself a grant of title to persons

who should act under it. They were invited to settle, if they had not already done so, and were told that they should have the land in case they should perfect their original titles by filing applications, etc., within a certain time after the doing so became possible. These people in this case settled, accordingly, or relied (if they had already done so, and the act speaks of those who had settled or should settle) upon that promise. They did so in good faith, expended large sums of money—probably all they accumulate to spend—twenty years of their time and labor in some cases. Now they are told that that was all for the benefit of the railroad company, unless they hung about the land office all day and every day with a complete set of papers they could not prepare, to be thrust in sooner than the railroad company, with its vast interests, its lawyers, and agents, could submit its suggestions, not to the Secretary of the Interior, who was to consider them, but at the same local land office.

If this is the law it ought not to be the law, and the presumption is that Congress enacts laws in a spirit of justice and with some wisdom.

The law ordinarily favors diligence; but when we consider all that was necessary to be done and found out to enable the appellant to make lists of surveyed tracts lost in place limits and of tracts intended to be selected as free public land in the indemnity limits, in order to be able, on the very day the survey plats were filed, to put in its lists in the local land office and then rushed through the approval and patenting, in

order to get the advantage of the settlers and turn them out of their homes, well, we have here diligence of a kind that a court of equity will be slow to encourage.

Respectfully submitted.

CHARLES W. RUSSELL,
Special Assistant Attorney-General.

O